

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

BRITTANY GUNSOLUS,

Petitioner,

v.

KYLE CABELKA, District Attorney of  
Comanche and Cotton Counties, in his official  
capacity,

Respondent.

No.

FILED  
SUPREME COURT  
STATE OF OKLAHOMA

DEC 14 2023

JOHN D. HADDEN  
CLERK

#121832

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APPLICATION TO ASSUME ORIGINAL JURISDICTION AND PETITION FOR  
WRIT OF PROHIBITION AND DECLARATORY RELIEF

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December 14, 2023

In 2019, the Oklahoma Legislature enacted the Medical Marijuana and Patient Protection Act (the “MMPPA” or “Act”), legalizing medical marijuana throughout Oklahoma and granting “medical marijuana patient[s] . . . in actual possession of a medical marijuana license” immunity from “arrest, prosecution or penalty in any manner . . . for the medical use of marijuana.” 63 O.S. § 427.8(F) (2019). Despite this grant of immunity, local District Attorneys have charged licensed medical marijuana patients with felony child neglect for exercising their rights under the MMPPA while pregnant.

Petitioner Brittany Gunsolus is one such patient. The District Attorney of Comanche and Cotton Counties, Kyle Cabelka, is prosecuting Ms. Gunsolus for felony child neglect—a charge that carries a potential sentence of lifetime imprisonment—on the false premise that Ms. Gunsolus used “illegal drugs” when pregnant, when the only purportedly “illegal” drug she used was legally obtained medical marijuana with a license, in accordance with a doctor’s lawful recommendation. Ms. Gunsolus must imminently decide whether to plead guilty to a crime she is not legally capable of committing or stand trial and risk a sentence of lifetime imprisonment, while also facing potential negative collateral consequences related to employment and custody of her children.

Prosecutions, such as Ms. Gunsolus’s, that rely on an interpretation of the child neglect statute in which licensed and legal medical marijuana is alleged to constitute an illegal drug are contrary to the plain terms of the MMPPA and create an irreparable conflict with the MMPPA. Such prosecutions also chill patients’ exercise of rights under the MMPPA and interfere in doctors’ healthcare decisions concerning medical marijuana for any patient who may become pregnant or breastfeed.

Ms. Gunsolus respectfully requests that this Court assume original jurisdiction and issue (1) a declaration interpreting the MMPPA as immunizing “medical marijuana patient[s] . . . in

actual possession of a medical marijuana license” from criminal prosecution for the “use of medical marijuana” and as providing that a licensed medical marijuana patient’s use of medical marijuana cannot constitute illegal drug use under the child neglect statute; and (2) a writ of prohibition barring District Attorney Cabelka from proceeding in the criminal matter against Ms. Gunsolus in Case No. CF-2021-287 as currently charged.

In support of this Application, Ms. Gunsolus shows the court:

1. The MMPPA legalized medical marijuana in Oklahoma. The Act provides:

*A medical marijuana patient or caregiver in actual possession of a medical marijuana license shall not be subject to arrest, prosecution or penalty in any manner or denied any right, privilege or public assistance, under state law or municipal or county ordinance or resolution including without limitation a civil penalty or disciplinary action by a business, occupational or professional licensing board or bureau, for the medical use of marijuana in accordance with this act.*

63 O.S. § 427.8(F) (emphasis added).

2. The MMPPA further provides:

[T]he authorized use of marijuana by a medical marijuana license holder shall be considered the equivalent of the use of any other medication under the direction of a physician and *does not constitute the use of an illicit substance.*

63 O.S. § 425(C) (2020) (emphasis added).

3. Petitioner Brittany Gunsolus was issued a valid medical marijuana license in September 2020 on the recommendation of a physician. As part of that license, a physician attested that Ms. Gunsolus had a medical condition for which the use of medical marijuana was recommended. Ms. Gunsolus used medical marijuana edibles and topical lotions pursuant to that valid license on an as-needed basis.

4. In October 2020, Ms. Gunsolus gave birth to a full-term, healthy baby. The State asserts that both Ms. Gunsolus and the baby purportedly tested positive for tetrahydrocannabinol (“THC”) at birth.

5. Despite the Oklahoma Department of Human Services' finding that any allegation against Ms. Gunsolus of neglect or harm due to the purported THC exposure was "unsubstantiated," District Attorney Cabelka charged Ms. Gunsolus with felony child neglect based solely on her licensed medical marijuana use. Ms. Gunsolus must decide whether to plead guilty by December 15, 2023, and trial is scheduled for January 2024.

6. Ms. Gunsolus is not alone. Several other women in Oklahoma have been charged with felony child neglect based only on their licensed medical marijuana use. As a result, all women of childbearing age in Oklahoma are unable to discern whether the MMPPA applies to them with the force of law. Statewide, women who may be eligible for, interested in, or already licensed to use medical marijuana risk criminal prosecution with lifetime imprisonment should they become pregnant or choose to breastfeed.

7. Oklahoma physicians who prescribe medical marijuana and who must exercise their medical judgment in recommending treatment for their patients also face uncertainty over the potential criminal implications for patients following their recommendations.

8. Facing prosecution and trial for a crime she cannot have committed as a matter of law, *see infra* ¶¶ 11–12, Ms. Gunsolus has standing to assert her own rights as well as to vindicate the public interest in this matter of public importance. *See Hunsucker v. Fallin*, 2017 OK 100, ¶¶ 5–6, 408 P.3d 599, 602–03.

9. The Respondent is Kyle Cabelka, District Attorney of Comanche and Cotton Counties, in his official capacity. District Attorney Cabelka charged and is prosecuting Ms. Gunsolus with felony child neglect based solely on her licensed medical marijuana use.

10. As explained in greater detail in the accompanying brief, interpretations of the child neglect statute, such as District Attorney Cabelka's in the prosecution against Ms. Gunsolus, that

consider licensed and legal medical marijuana to be an “illegal drug” contravene the plain and unambiguous language of the MMPPA and create an irreconcilable conflict between the neglect statute and the MMPPA’s mandates that “medical marijuana patient[s] . . . shall not be subject to arrest, prosecution or penalty in any manner” for their licensed use of medical marijuana and that “authorized use of marijuana by a medical marijuana license holder . . . does not constitute the use of an illicit substance.”

11. Because the MMPPA was enacted more recently and specifically addresses the prosecution of patients for licensed medical marijuana use and the legality of medical marijuana, its terms must “control[]” and be read as “modif[ying]” the child neglect statute such that licensed and legal medical marijuana use does not constitute illegal drug use. *See Okla.’s Children, Our Future, Inc. v. Coburn*, 2018 OK 55, ¶ 49, 421 P.3d 868, 880; *Pub. Serv. Co. of Okla. v. Ne. Okla. Elec. Coop., Inc.*, 2002 OK 29, ¶ 14, 49 P.3d 80, 83; *State ex rel. Trimble v. City of Moore*, 1991 OK 97, ¶¶ 29–30, 818 P.2d 889, 898–99.

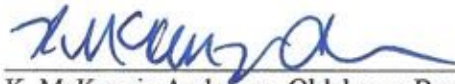
12. Ms. Gunsolus’s licensed and legal medical marijuana use cannot sustain a charge of child neglect as a matter of law. *See Clark v. State*, 1911 OK CR 260, 116 P. 200, 202 (“without [an essential element of the offense] the crime does not exist”). Executive officers, including District Attorney Cabelka, have no legal authority to prosecute someone for conduct that is not criminal as a matter of law. *See State v. Berry*, 1990 OK CR 73, ¶ 9, 799 P.2d 1131, 1133 (“A defendant cannot be held to answer for actions which do not amount to a crime as defined by our statutes.”).

13. The exercise of the District Attorney’s unauthorized and illegitimate authority has injured Ms. Gunsolus for which there is no adequate remedy at law.

14. This Application is not filed within ten days of any scheduled trial or hearing date.  
Rule 1.191(i).

WHEREFORE, Ms. Gunsolus requests that this Court assume original jurisdiction and issue (1) a declaration interpreting the MMPPA as immunizing “medical marijuana patient[s] . . . in actual possession of a medical marijuana license” from criminal prosecution for the “use of medical marijuana” and as providing that a licensed medical marijuana patient’s use of legal medical marijuana cannot constitute illegal drug use under the child neglect statute; and (2) a writ of prohibition barring District Attorney Cabelka from proceeding in the criminal matter against Ms. Gunsolus in Case No. CF-2021-287 as currently charged.

Respectfully submitted,



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Certificate of Service

I hereby certify that on the 14th day of December, 2023, a true and correct copy of the foregoing was served by hand to:

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## INTRODUCTION

The Medical Marijuana and Patient Protection Act (the “MMPPA” or “Act”) legalized medical marijuana throughout Oklahoma, granting “medical marijuana patient[s] . . . in actual possession of a medical marijuana license” immunity from “arrest, prosecution or penalty in any manner. . . for the medical use of marijuana.” 63 O.S. § 427.8(F) (2019).<sup>1</sup> Despite this grant of immunity, women of childbearing age across Oklahoma, and their healthcare providers, are unable to decipher whether this protection operates with the force of law because district attorneys have charged licensed medical marijuana patients with felony child neglect—carrying the potential of life imprisonment—for exercising their rights under the MMPPA while pregnant.

Here, Petitioner Brittany Gunsolus is being prosecuted by the District Attorney of Comanche County, Kyle Cabelka, for felony child neglect on the false premise that Ms. Gunsolus used illegal drugs when pregnant, based solely on her use of *legally* obtained medical marijuana with a license, in accordance with a doctor’s lawful recommendation. *See* Information, App. at 2; Mot. Quash Response, App. at 47. Not only did the MMPPA grant Ms. Gunsolus immunity, but it also expressly classified licensed medical marijuana to be a legal drug.

Ms. Gunsolus is not alone; numerous other women have been arrested and charged under similar circumstances.<sup>2</sup> Such prosecutions disrespect the rule of law by violating the

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<sup>1</sup> Although the MMPPA has been amended in other ways, this language has not changed.

<sup>2</sup> *See, e.g.*, Tiffany Bechtel, *Arrest warrants filed for multiple Lawton women accused of child neglect*, KSWO (May 24, 2021, 11:57 PM), <https://www.ksw.com/2021/05/25/arrest-warrants-filed-for-multiple-lawton-women-accused-of-child-neglect/> (identifying three other women charged with child neglect after their children’s umbilical cords allegedly tested positive for marijuana); Brianna Bailey, *Oklahoma is prosecuting pregnant women for using*

MMPPA's explicit terms. And they cloud the validity and enforceability of the MMPPA, impermissibly chilling patients' exercise of rights and interfering in doctors' healthcare decisions concerning medical marijuana for patients who are pregnant, may become pregnant, or are breastfeeding.

This Court should assume original jurisdiction to resolve this conflict and interpret the MMPPA according to its plain terms because this issue "concern[s] the public interest" and there is a "pressing need for an early decision." *Edmondson v. Pearce*, 2004 OK 23, ¶ 11, 91 P.3d 605, 613. Ms. Gunsolus must decide imminently whether to accept a plea for a crime for which the Legislature granted immunity, or to stand trial and risk life imprisonment and the collateral consequences of facing criminal charges, including potentially losing custody of her children and negative employment impacts. She is not the only person facing this predicament. Statewide, women who may be eligible for, benefit from, or are already licensed to use medical marijuana to treat any number of health conditions risk criminal prosecution with lifetime imprisonment and losing custody should they become pregnant or choose to breastfeed. And healthcare providers, who must exercise their medical judgment in recommending treatment for their patients, face uncertainty over the potential criminal implications for patients following their recommendations. The Court's immediate attention is required to address this urgent issue of public importance.

To be clear, Ms. Gunsolus is being prosecuted *solely* for the traces of medical marijuana detected in her newborn's urine; the Department of Human Services closed its investigation

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*medical marijuana*, The Frontier (Sept. 13, 2022), <https://www.readfrontier.org/stories/oklahoma-is-prosecuting-pregnant-women-for-using-medical-marijuana/> (identifying at least eight women charged with felony child neglect for using marijuana during pregnancy despite possessing a medical marijuana license).

after finding that neglect was unsubstantiated and concluding that Ms. Gunsolus’s children are healthy and being raised in a safe and loving home. Prelim. Hr’g, App. at 16–19. Yet Ms. Gunsolus is facing the possibility of lifetime imprisonment, and she risks permanent separation from her children—an outcome that would surely make her children less safe<sup>3</sup>—for exercising rights the Legislature concluded “shall not” subject one to “prosecution or penalty in any manner.” 63 O.S. § 427.8(F).

The MMPPA clearly and unmistakably immunizes Ms. Gunsolus’s conduct and declares licensed medical marijuana to be a legal drug as a matter of law. District attorneys, therefore, have no legal authority to prosecute women for child neglect based exclusively on their legal use of licensed medical marijuana. This Court should assume original jurisdiction to resolve this statutory conflict and prohibit District Attorney Cabelka from prosecuting Ms. Gunsolus as currently charged.

## BACKGROUND

### I. Legal Background

The voters of Oklahoma passed State Question 788 in summer 2018, legalizing the licensed growth, sale, and use of medical marijuana across Oklahoma. *Cloudi Mornings, LLC v. City of Broken Arrow*, 2019 OK 75, ¶ 0, 454 P.3d 753, 754. To create a regulatory framework for the newly legalized substance, the Oklahoma legislature—with an

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<sup>3</sup> See Rohan Khazanchi & Tyler N.A. Winkelman, *Health Care Access and Use Among Children & Adolescents Exposed to Parental Incarceration—United States, 2019*, 23 *Academic Pediatrics* 464, 466–71 (2002) (finding that “[e]xposure to [parental incarceration] is associated with worse access to a usual source of care and unmet dental and mental health care needs”); Makeda K. Austin, Inez I. White, & Andrew Wooyoung Kim, *Parental incarceration and child physical health outcomes from infancy to adulthood: A critical review and multi-level model of potential pathways*, 34(5) *Am. J. Hum. Bio.* 1, 4 (2022) (“[P]arental incarceration is associated with negative outcomes ranging from unmet health needs, lower healthcare access, chronic disease incidence, and premature mortality.”).



overwhelming bipartisan majority<sup>4</sup>—enacted the MMPPA, codified at 63 O.S. § 427.1. The MMPPA was signed into law on March 14, 2019, and first became effective on August 30, 2019. 63 O.S. § 427.1 (2019).

The MMPPA codifies the rights of Oklahoma residents to use medical marijuana without the risk of civil or criminal penalties. It provides: “*A medical marijuana patient . . . in actual possession of a medical marijuana license shall not be subject to arrest, prosecution or penalty in any manner or denied any right . . . under state law . . . for the medical use of marijuana* in accordance with this act.” 63 O.S. § 427.8(F) (emphasis added). The MMPPA affirmatively classifies medical marijuana as a legal prescription drug, no different than a broad-spectrum antibiotic. 63 O.S. § 425(C) (2020) (“the authorized use of marijuana by a medical marijuana license holder shall be considered *the equivalent of the use of any other medication* under the direction of a physician and *does not constitute the use of an illicit substance*”) (emphasis added).

Criminal child neglect is defined in a different statute, which predates the MMPPA. See CHILD ABUSE, 2014 Okla. Sess. Law Serv. Ch. 240 (H.B. 2334). Title 21, Section 843.5 criminalizes “willful[] or malicious[] . . . child neglect,” which has been defined since July 1, 2009, to include “(2) the failure or omission to protect a child from exposure to . . . (a) *the use, possession, sale, or manufacture of illegal drugs,*” 10A O.S. § 1-1-105(46)(b), now codified at § 1-1-105(49)(2) (together, the applicable “Neglect Statute”) (emphasis added). Criminal child neglect carries a potential sentence of life imprisonment. 21 O.S. § 843.5(C).

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<sup>4</sup> Votes, OK HB 2612, 2019, Regular Session, <https://legiscan.com/OK/votes/HB2612/2019>.

## II. Factual Background

The Oklahoma Medical Marijuana Authority (“OMMA”) approved and issued Ms. Gunsolus’s medical marijuana license, effective September 30, 2020, and she thereafter legally used medical marijuana edibles and topical lotions on an “[as] needed” basis based on the recommendation of her doctor. License, App. at 95–105; Prelim. Hr’g, App. at 17. On October 21, 2020, Ms. Gunsolus gave birth to a full-term, healthy baby. Prelim. Hr’g, App. at 14. Ms. Gunsolus received prenatal care throughout her pregnancy. *Id.* at 8. Although the State alleges that both Ms. Gunsolus and her baby tested positive for tetrahydrocannabinol (“THC”) at birth, it introduced no evidence of a confirming laboratory report, and the baby was born healthy, with medical staff confirming the baby presented no marijuana “withdrawal” symptoms—the State’s indicator for whether the child was affected by the alleged exposure. Prelim. Hr’g, App. at 7, 15.

The Department of Human Services investigated Ms. Gunsolus for neglect due to the alleged THC exposure. *Id.* at 7. That investigation found that any allegation of neglect or harm due to exposure was “unsubstantiated” and that court intervention was not needed because the Gunsolus home was a clean, “safe [] environment,” the children were cared for, and there was “no[] . . . safety threat in the home,” including from “marijuana use.” *Id.* at 16–20. The DHS investigation was closed on December 30, 2020. *Id.* at 23.

The prosecution admitted that Ms. Gunsolus held a validly issued medical marijuana license at all relevant times. Mot. Quash Tr., App. at 62. Nevertheless, on May 19, 2021, District Attorney Cabelka charged Ms. Gunsolus with one count of child neglect pursuant to 21 O.S. § 843.5(C) based solely on her licensed medical marijuana use during pregnancy. Information, App. at 2, Affidavit, App. at 1. Ms. Gunsolus was bound over for trial after the judge found that “the State met its burden and showed probable cause that [Ms. Gunsolus] used

an illegal drug while she was pregnant.” Prelim. Hr’g, App. at 31. Ms. Gunsolus moved to quash the bindover, and the motion was overruled. Mot. Quash, App. at 34–42; Order Overruling Mot. Quash, App. at 71. Ms. Gunsolus petitioned the Court of Criminal Appeals for extraordinary relief. Petition for Writ, App. at 72–85. The Court of Criminal Appeals denied that petition on procedural grounds, holding that a criminal defendant like Ms. Gunsolus has no right of direct appeal from a ruling on a pretrial motion to quash. Order Denying Writ, App. at 93. Ms. Gunsolus is scheduled for trial in January 2024, and the deadline for Ms. Gunsolus to notify the court if she is accepting a plea is December 15, 2023.

### **JURISDICTION**

This Court may assume its original jurisdiction and grant writs or issue declaratory relief when the matter “concern[s] the public interest” and there is “some urgency or pressing need for an early decision.” *Edmondson*, 2004 OK at ¶ 11, 91 P.3d at 613. Both requirements are satisfied here.

The public interest is clear: protecting pregnant women and breastfeeding mothers from illegal prosecutions based exclusively on their use of licensed medical marijuana is in the public interest and keeps families together. *See supra* at 1 & n.1; *Hunsucker v. Fallin*, 2017 OK 100, ¶¶ 5–6, 408 P.3d 599, 602 (granting a petitioner “public importance” standing to seek relief on behalf of himself and those similarly situated). The prosecution of Ms. Gunsolus and other similarly situated women causes uncertainty for the thousands of physicians authorized to recommend medical marijuana under the Act and Oklahoma residents who are, or are eligible to become, licensed medical marijuana users. Any physician who believes that medical marijuana would benefit a woman of childbearing age—such as for the treatment of

chronic pain or to ease chemotherapy-induced nausea<sup>5</sup>—now must second guess whether such a prescription would violate the law and expose the patient to criminal prosecution. And any woman seeking medical care risks future criminal prosecution with the potential for lifetime imprisonment if she is recommended medical marijuana, uses that medication in accordance with the law and the recommendations of her doctor, and is or becomes pregnant or breastfeeds.

Moreover, time is of the essence. Ms. Gunsolus must imminently decide whether to face trial or accept a plea for a crime she is legally incapable of committing. *See Russell v. Henderson*, 1979 OK 164, ¶ 2, 603 P.2d 1132, 1134 (“the presence of other ongoing proceedings [] make[s] an early decision necessary if the public weal and judicial economy are to be served”).

The Court may also assume its original jurisdiction if there is no adequate remedy at law, or where the usual appellate process “does not provide ‘plain speedy and adequate relief’ under the circumstances.” *Stewart v. Judge of 15th Jud. Dist.*, 1975 OK 156, ¶ 6, 542 P.2d 945, 947; *see also Ethics Comm’n of State of Okla. v. Cullison*, 1993 OK 37, ¶¶ 6–7, 850 P.2d 1069, 1073. The usual appellate process would fail Ms. Gunsolus and others in her shoes: anyone prosecuted for licensed medical marijuana use must first stand trial and be found guilty of a crime she is legally incapable of committing before being entitled to appellate relief—a grueling prospect for anyone to endure, particularly when it runs the risk of incarceration and separation from her child or children. Indeed, courts have recognized that facing criminal prosecution constitutes irreparable harm. *E.g., ABC Charters, Inc. v. Bronson*, 591 F. Supp. 2d 1272, 1309 (S.D. Fla. 2008) (“The threat of criminal prosecution [] constitutes irreparable

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<sup>5</sup> Laura Silva, *Health Benefits Of Cannabis, According to Experts*, Forbes Health (Sept. 7, 2023, 4:02 AM), <https://www.forbes.com/health/cbd/health-benefits-of-cannabis/> (finding that marijuana is an effective treatment for several health conditions).

harm.”); *Anderson v. Vaughn*, 333 F. Supp. 703, 705 (D. Conn. 1970) (A “prosecution under a statute that suppresses [granted] freedom[s] . . . cause[s] irreparable injury regardless of its outcome.”). So too does “violation of a statutory right,” such as the violation of Ms. Gunsolus’s statutory right under the MMPPA to use licensed medical marijuana without risk of criminal prosecution. See *Public Serv. Co. of Okla. v. Duncan Pub. Utils. Auth.*, 2011 OK CIV APP 15, ¶ 14, 248 P.3d 400, 403.

Moreover, this Court’s intervention is particularly appropriate here because this application seeks resolution of a pure “question of law”: which statute controls when two conflict. Only this Court has the ultimate authority to answer that question. *Duke v. Duke*, 2020 OK 6, ¶ 7, 457 P.3d 1073, 1076. This Court has previously assumed its original jurisdiction in matters concerning interpretation of conflicting statutes. See *Okla.’s Children, Our Future, Inc. v. Coburn*, 2018 OK 55 ¶¶ 0, 49, 421 P.3d 868, 880. The fact that Ms. Gunsolus faces criminal charges does not present any barrier to this Court’s exercise of its original jurisdiction. *Russell*, 1979 OK at ¶ 2, 603 P.2d at 1134 (“exercising [the Court’s] discretionary original jurisdiction to review a trial court’s order in effect overruling the demurrer of Petitioner”).

#### **ARGUMENTS AND AUTHORITIES**

Despite the MMPPA’s unambiguous mandates that “medical marijuana patient[s] . . . shall not be subject to arrest, prosecution or penalty in any manner” for their licensed use of medical marijuana and that medical marijuana is classified as a legal drug, District Attorney Cabelka is prosecuting Ms. Gunsolus for exercising her right to use licensed medical marijuana as a patient protected by the MMPPA. The MMPPA’s “language is plain and clearly expresses the legislative will, [so] further inquiry is unnecessary.” *White v. Heng Ly Lim*, 2009 OK 79, ¶ 12, 224 P.3d 679, 684. Because the MMPPA was enacted more recently and is more specific,

its terms must “control[]” and be read as “modif[ying]” the Neglect Statute such that licensed medical marijuana use is not illegal drug use, and individuals are immune from prosecution for such legal drug use. *See Okla. 's Children*, 2018 OK at ¶ 49, 421 P.3d at 880 (citing 75 O.S. § 22). The Court should resolve this conflict as a matter of law and prohibit District Attorney Cabelka from prosecuting Ms. Gunsolus.

**I. This Court should issue a declaration interpreting the MMPPA according to its plain terms and as providing that a licensed medical marijuana patient’s use of medical marijuana cannot be prosecuted and is not illegal drug use under the Neglect Statute.**

This Court’s “primary goal when reviewing a statute is to ascertain legislative intent, . . . from a reading of the statutory language using its plain and ordinary meaning.” *Duke*, 2020 OK at ¶ 21, 457 P.3d at 1080. “If wording in a statute is plain, clear and unambiguous then the plain meaning of the words used must be judicially accepted as expressing the intent of the Legislature,” *State ex rel. Bd. of Regents of Univ. of Okla. v. Lucas*, 2013 OK 14, ¶ 15, 297 P.3d 378, 387, and the statute “will receive the interpretation and effect its language dictates,” *Rogers v. Quiktrip Corp.*, 2010 OK 3, ¶11, 230 P.3d 853, 859, *as revised* (Feb. 4, 2010), *as revised* (Mar. 8, 2010).

The MMPPA is plain and unambiguous. It provides that “*medical marijuana patient[s]* . . . in actual possession of a medical marijuana license *shall not be subject to arrest, prosecution or penalty in any manner . . . for the medical use of marijuana.*” 63 O.S. § 427.8(F) (emphasis added). The immunity granted by the Act does not exclude any subset of medical marijuana patients, such as pregnant individuals, individuals capable of becoming pregnant, or breastfeeding mothers. Rather, it applies to *all* “medical marijuana patients” who possess “medical marijuana license[s].” *See Matter of Conservatorship of Spindle*, 1986 OK 65, ¶ 11, 733 P.2d 388, 390 (statutes “apply” to those “classification[s]” “the Legislature

specifically sets forth”). For this reason, the prosecution’s argument (Mot. Quash Response, App. at 45; Mot. Quash Tr., App. at 62) that pregnant individuals are not protected by the MMPPA because the statute does not specifically mention pregnancy is exactly backwards. The MMPPA applies to persons and conduct “specifically enumerated,” *White v. Wint*, 1981 OK 154, ¶ 9, 638 P.2d 1109, 1114—here, “medical marijuana patient[s] . . . in actual possession of a medical marijuana license . . . [who] use [medical] marijuana.”<sup>6</sup> The plain and unambiguous language of the MMPPA, therefore, immunizes every licensed medical marijuana user—including Ms. Gunsolus—from criminal prosecution for any crime based on licensed medical marijuana use.

The MMPPA goes further to affirmatively classify medical marijuana as a “legal[]” drug, no different than any other legally-prescribed drug. 63 O.S. § 425(C) (2020) (characterizing medical marijuana use as “*equivalent of the use of any other medication* under the direction of a physician” and declaring that medical marijuana use “*does not constitute the use of an illicit substance*”) (emphasis added); 63 O.S. § 420(A)(1) (2020) (“A person in possession of a state-issued medical marijuana license shall be able to: [] Consume marijuana

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<sup>6</sup> Indeed, the OMMA has acknowledged the existence of pregnant and breastfeeding licensed medical marijuana users, stating, “there aren’t any rules against using marijuana or holding a medical marijuana license during pregnancy.” Ashley Moss, *Investigation: Women prosecuted for using medical marijuana during pregnancy*, KFOR (Sept. 30, 2022, 6:30 AM), <https://kfor.com/news/local/investigation-women-prosecuted-for-using-medical-marijuana-during-pregnancy/>. The OMMA’s “Patient Rights & Responsibilities” webpage includes a subsection on “Pregnancy/Breastfeeding” that warns of potential risks but does not characterize medical marijuana use during pregnancy as prohibited by law. In contrast, the OMMA informs medical marijuana patients that they are prohibited from sharing their medical marijuana, traveling outside state lines with their medical marijuana products, and possessing more than certain amounts of medical marijuana by law. See Patient Rights & Responsibilities, Oklahoma Medical Marijuana Authority, <https://oklahoma.gov/omma/patients-caregivers/patient-rights-and-responsibilities.html#:~:text=Medical%20Care%20-%2063%20O.S.%20%C2%A7%20425%20%28C%29,substance%20or%20disqualify%20a%20patient%20from%20medical%20care>.

*legally.*”) (emphasis added); *Cloudi Mornings*, 2019 OK at ¶ 3, 454 P.3d at 755 (“Petition 788 [] *legalized* medical marijuana in the State of Oklahoma”); *State v. Roberson*, 2021 OK CR 16, ¶¶ 11–12, 492 P.3d 620, 623 (medical marijuana use by “those holding medical marijuana licenses” “*is legal*”) (emphasis added).

The conflict of law is therefore twofold. First, prosecuting Ms. Gunsolus for licensed medical marijuana use directly conflicts with the immunity granted by the MMPPA. Second, Ms. Gunsolus cannot be prosecuted for exposing her child to an “illegal drug” because medical marijuana is “equivalent to . . . any other medication under the direction of a physician” and is “not . . . an illicit substance.” 63 O.S. § 425(C); see *State ex rel. Trimble v. City of Moore*, 1991 OK 97, ¶ 29, 818 P.2d 889, 898 (“A conflict exists . . . when both [statutes] contain either express or implied provisions that are inconsistent or irreconcilable with one another.”).

The MMPPA’s terms must govern because they are more specific. “[W]here there are two statutory provisions, one of which is special and clearly includes the matter in controversy, . . . the special statute, and not the general statute applies.” *Indep. Sch. Dist. No. 1 of Tulsa Cnty. v. Bd. of Cnty. Comm’rs of Tulsa Cnty.*, 1983 OK 123, ¶ 10, 674 P.2d 547, 549–50; *Trimble*, 1991 OK at ¶¶ 29–30, 818 P.2d at 898–99 (the “*specific* provisions” of statute that “specifically authorizes health insurance benefits” trumps general provisions of another section “*silent on the issue of benefits*” (emphasis in original)). The MMPPA specifically addresses the circumstance here—criminal prosecution of a patient for licensed medical marijuana use, and the legality of medical marijuana. The Neglect Statute, in contrast, generally prohibits



exposing children to “illegal drugs” but is silent as to what constitutes such illegal drugs.<sup>7</sup> The MMPPA’s more specific and unambiguous language controls.

The MMPPA’s terms also control because they are more recent. When two statutes conflict, it is the Court’s duty to “determine the latest expression of the legislative will.” *Pub. Serv. Co. of Okla. v. Ne. Okla. Elec. Coop., Inc.*, 2002 OK 29, ¶ 14, 49 P.3d 80, 83. This means that “th[e] later-enacted legislation controls over the earlier-enacted [legislation].” *Okla.’s Children*, 2018 OK at ¶ 49, 421 P.3d at 880 (citing 75 O.S. § 22). And where, as here, there is “an irreconcilable conflict in statutory language, the later enacted statute modifies the earlier statute.” *Id.* The MMPPA classified medical marijuana as a legal drug and is the “latest expression of the legislative will.” *Pub. Serv. Co. of Okla.*, 2002 OK at ¶ 14, 49 P.3d at 83. The MMPPA, therefore, “controls” and must be interpreted as “modif[ying]” the Neglect Statute to the extent the two conflict. *Okla.’s Children*, 2018 OK at ¶ 49, 421 P.3d at 880. This requires interpreting the MMPPA as immunizing “medical marijuana patients . . . in actual possession of a medical marijuana license” from criminal prosecution for “the medical use of marijuana,” and as providing that the use of such medical marijuana does not constitute use of an illegal drug under the Neglect Statute. *See Clifton v. Clifton*, 1990 OK 88, ¶ 10, 801 P.2d 693, 697 (This Court will “adopt the construction [of a statute] which avoids conflict” and reject the construction that creates “an irreconcilable conflict.”).

Interpreting the MMPPA in this way harmonizes the MMPPA with the Neglect Statute and gives effect to the Legislature’s intent to legalize medical marijuana but criminally punish

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<sup>7</sup> Moreover, the Neglect Statute must be flexible to accommodate the Legislature’s classifications of new street drugs and controlled substances as legal or illegal; it cannot be construed as an inflexible statute frozen in time to apply only to drugs that were illegal in July 2009, when the child neglect language was codified.

persons who expose children to *illegal* drug use. “[I]t is the duty of the court . . . to reconcile [] different . . . statute[s], so as to make them consistent and harmonious, and to give a sensible and intelligent effect to each.” *In re Farmers’ State Bank of Ames*, 1937 OK 707, 74 P.2d 1166, 1168.

## **II. A writ of prohibition should be issued.**

Because medical marijuana patients cannot be prosecuted for licensed medical marijuana use and licensed medical marijuana use cannot constitute illegal drug use as a matter of law, executive officers like District Attorney Cabelka have no legal authority to prosecute Ms. Gunsolus or others similarly situated for child neglect premised entirely on licensed medical marijuana use. This Court should issue a writ of prohibition barring Mr. Cabelka from proceeding in the criminal matter against Ms. Gunsolus as currently charged.

Before a writ of prohibition may issue, a petitioner must show: “(1) a court, officer, or person has or is about to exercise judicial or quasi-judicial power; (2) the exercise of said power is unauthorized by law; and (3) the exercise of that power will result in injury for which there is no other adequate remedy.” *Cannon v. Lane*, 1993 OK 40 ¶ 12, 867 P.2d 1235, 1239. All three requirements are met here.

*First*, District Attorney Cabelka has exercised and is about to exercise “quasi judicial” power through his prosecution of Ms. Gunsolus. *See Watson v. State*, 1912 OK CR 224, 124 P. 1101, 1106 (“The district attorney is a quasi judicial officer”); *Hux v. State*, 1976 OK CR 205 ¶ 23, 554 P.2d 82, 86 (“A prosecuting attorney in a criminal case . . . is a quasi judicial officer.”). *Second*, executive officers prosecuting women for child neglect based on licensed medical marijuana use while pregnant are acting in excess of their authority and, therefore, are unauthorized by law. Because medical marijuana is a legal medication, *supra* Part I, the State cannot prove that Ms. Gunsolus used or possessed “illegal drugs.” Vernon’s

Okla. Forms 2d, OUJI-CR 4-37 (identifying use of “illegal drugs” as an essential element). “[W]ithout [this essential element,] the crime [of child neglect] does not exist,” *Clark v. State*, 1911 OK CR 260, 116 P. 200, 202, and neither Ms. Gunsolus, nor any other similarly situated person, can have committed child neglect as a matter of law, *State v. Berry*, 1990 OK CR 73, ¶ 9, 799 P.2d 1131, 1133 (“A defendant cannot be held to answer for actions which do not amount to a crime as defined by our statutes.”). Executive officers, including District Attorney Cabelka, have no legal authority to prosecute someone for conduct that is not a crime. *Ex parte Show*, 1910 OK CR 223, 113 P. 1062, 1066 (“A court can punish for no act except what is made criminal by law,” such action would be “void”). Indeed, the sole power to determine what acts are illegal “is vested in the legislature.” *Payne v. Kerns*, 2020 OK 31, ¶ 6, 467 P.3d 659, 670 (Kauger, J., concurring).

*Finally*, the exercise of the District Attorney’s unauthorized and illegitimate prosecution constitutes irreparable harm to Ms. Gunsolus for which there is no adequate remedy at law: she is facing potential lifetime imprisonment and loss of custody of her children for a crime she could not commit as a matter of law. *See State ex rel. Wise v. Clanton*, 1977 OK CR 45, ¶ 14, 560 P.2d 588, 591 (“(the writ) will be granted where the remedy available is insufficient to prevent immediate injury or hardship to the party complaining, particularly in criminal cases”); *Evans v. Trimble*, 1987 OK CR 257, ¶¶ 7, 11, 15, 746 P.2d 680, 683, 684–85 (petitioner entitled to writ of prohibition barring State from prosecuting him for conduct that was not yet illegal).

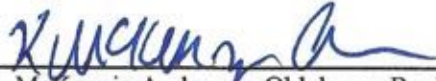
In *Leftwich v. Court of Criminal Appeals of State*, two Justices of this Court endorsed the relief that Ms. Gunsolus requests, and would have granted a writ of prohibition barring a District Attorney from prosecuting conduct that was not illegal as a matter of law. 2011 OK

80, ¶¶ 1, 10, 262 P.3d 750, 751, 753 (Watt, J., dissenting); *id.* at ¶¶ 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

## CONCLUSION

The Court should (1) issue a declaration interpreting the MMPPA as immunizing “medical marijuana patient[s] . . . in actual possession of a medical marijuana license” from criminal prosecution for the “use of medical marijuana” and as providing that a licensed medical marijuana patient’s use of medical marijuana cannot constitute illegal drug use under the Neglect Statute; and (2) issue a writ of prohibition barring District Attorney Cabelka from proceeding in the prosecution of Ms. Gunsolus in Case No. CF-2021-287, as currently charged.

Respectfully submitted,



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Certificate of Service

I hereby certify that on the 14th day of December, 2023, a true and correct copy of  
the foregoing was served by hand to:

Kyle Cabelka, District Attorney, Comanche and Cotton Counties  
Madeline Vasquez, Assistant District Attorney, Fifth Judicial District  
Comanche County Courthouse  
315 S.W. 5th Street, Room 502  
Lawton, Oklahoma 73501

  
K. McKenzie Anderson